No. 14-1382

IN THE

Supreme Court of the United States

AMERICOLD REALTY TRUST,

Petitioner,

v.

CONAGRA FOODS, INC., ET AL.,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

KRISTIN LINSLEY MYLES
JOSHUA PATASHNIK
MUNGER, TOLLES & OLSON LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
(415) 512-4000

MICHAEL D. POSPISIL
Counsel of Record
JOHN M. EDGAR
EDGAR LAW FIRM LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105
mdp@edgarlawfirm.com
(816) 531-0033

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REPLY BRIEF FOR THE PETITIONER

This case presents the important question of how the citizenship of a trust should be determined for purposes of diversity jurisdiction when the trust itself is named as a party. Consistent with *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), no party contends that the trust should be treated as having citizenship in its own right—such that the trust, like a corporation, would carry the citizenship of its place of formation or principal place of business. Rather, it is common ground that courts must look *through* the trust to some other group of persons, the citizenship of whom would then be attributed to the trust. The sole question before this Court is: to what group of persons should courts look in making that inquiry?

Petitioner Americold Realty Trust ("Americold") submits that this Court's precedents already provide a clear and easily administrable answer to that question. Simply put, in cases involving trusts and trustees, where the bona fide trustees of a trust possess the "customary powers to hold, manage, and dispose of [trust] assets for the benefit of others," it is their citizenship—and not that of the beneficial holders or other constituencies—that controls for purposes of diversity jurisdiction. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 (1980); see also Pet. Br. 11-14; *Bullard v. City of Cisco*, 290 U.S. 179, 189-190 (1933); *Thomas v. Bd. of Trustees of Ohio State Univ.*, 195 U.S. 207, 218 (1904).

Although the *Navarro* line of cases involved actions in which the trustees were parties in their own name, whereas here the trust itself is the party, the practice

of looking through the trust (as *Carden* instructs) brings the analysis back to the same question that was presented in *Navarro*: as between the trustees and the beneficiaries, whose citizenship should be considered? And as *Navarro* explains, it makes no sense to look to beneficial holders in a case involving a trust because historically it is the trustee who controls the trust property, including any litigation. 446 U.S. at 464-65. Beneficiaries, by contrast, have no power to control trust assets and, in some trust structures, may not even be identifiable. The distinction in *Navarro* between trustees and beneficiaries is supported by centuries-old trust law recognizing that the separation of legal from equitable or beneficial title necessarily means that the trustees, and not the beneficiaries, control the trust property and otherwise are the embodiment of the trust in trust-related litigation.

In contrast to the straightforward rule that follows from the *Navarro* line of cases, respondents articulate no test—clear or otherwise—for federal courts to apply in determining the citizenship of a trust. Instead, they describe a series of supposedly unique legal attributes of Maryland real estate investment trusts (REITs), and argue that these attributes mean that Maryland REITs are not "real" trusts; that they instead should be treated like unincorporated business associations under *Carden*; and that, in that context, courts should consider the citizenship of all of the beneficiaries of such a trust in lieu of, or in addition to, that of the trustees. See Resp. Br. 19-33.

This myopic focus on one state's REIT law not only evades the question presented, but is incorrect. Maryland REIT law is unremarkable in any way relevant here. It simply allows the REIT to sue and be sued in

its own name—a common attribute of certain types of trusts in many states, and one that does not render the trust anything less than a "real" trust. The fundamental aspects of trust law that the Court outlined in *Navarro* still are present: a separation of legal from equitable title and the trustees' complete and exclusive control of the trust property. These fundamental trust characteristics compel the conclusion that, when looking through the trust in the context of determining citizenship, the trustee's citizenship, rather than that of the beneficial or equitable holders, should govern. Although some modern business trusts differ in certain ways from traditional trusts, the key defining characteristics of the trust identified in *Navarro* are common and dispositive. Respondents' litany of legal details supposedly unique to Maryland REITs does not affect that analysis.

As for respondents' newly proposed alternative ground for affirmance, although it lacks merit, this Court need not and should not address the issue in the first instance. The Court should resolve the question presented in Americold's favor, vacate the judgment below founded on faulty reasoning, and remand for further proceedings—including appropriate consideration of the alternative ground that respondents now raise.

ARGUMENT

A. The Court Should Reaffirm the Clear, Longstanding Rule that the Citizenship of Trustees Controls in Cases Involving Trusts and Trust Assets

1. This Court long has held that, when the issue of diversity jurisdiction arises in litigation involving

trusts and trust assets, it is the citizenship of the bona fide trustees, and not that of any beneficial or equitable holders of trust property, that governs the inquiry. Respondents do not take issue either with those prior holdings or with the principle that jurisdictional rules should be "as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010); see Resp. Br. 16. They nonetheless contend that in a case involving a Maryland REIT, courts should apply a special analysis that looks to all "members" of the REIT—a group that, in respondents' view, should include all of the trust's beneficial or equitable holders. See Resp. Br. 19-33.

The Court should reject respondents' invitation to fashion a test based on any supposedly unique aspects of Maryland law, and should instead adhere to its longstanding rule that the citizenship of the trustees, not that of trust beneficiaries, is determinative in cases involving trust assets. The Court has applied that rule repeatedly in cases in which one or more trustees is named as a party to the litigation, rejecting the argument (advanced in *Navarro*) that the citizenship of the beneficiaries should control. See 446 U.S. at 461-62. The same rule should apply where, as here, the trust itself is named as a party and *Carden* instructs courts to look *through* the trust entity. Courts considering the citizenship of the trust party, after effecting the *Carden* "look-through," are faced with the exact same question that was presented in *Navarro*: in a case involving a trust and trust property, whose citizenship should control, that of the trustees or that of the beneficiaries? For reasons that fully apply here, and following decades of precedent, the Court in *Navarro* squarely held that the trustees' citizenship, not that of the beneficiaries, controls. That result makes eminent

sense—both in a case involving named trustees and in a case involving a named trust through which the court must look under *Carden*—because under the fundamental trust principle of separation of legal from equitable title, the trustees, and not the beneficial or equitable holders, control the trust property, including its disposition in litigation affecting the trust. See Pet. Br. 15-19; 28-31.

2. Respondents fail to offer anything resembling an administrable test that could be applied by lower federal courts confronted with litigation in which a trust is a party.

Respondents' main argument is that, despite the word "trust" in its name, a Maryland REIT is not actually a trust at all, but is more akin to an unincorporated association, such that it should take on the citizenship of all of its "members" under the second half of this Court's analysis in *Carden*. See Resp. Br. 19-22. Respondents further posit that, under the supposedly unique aspects of Maryland law, the "members" of a Maryland REIT should include not only the trustees, but also (or instead) the beneficial or equitable holders of the trust property. See *id.* 23-25.

Respondents' extensive discussion of the particular attributes of Maryland REITs is both irrelevant and wrong, see *infra* at 13-16, but even on its own terms, the argument raises more questions than it answers. How, for instance, should a federal court decide whether a trust in a particular case is a "real" trust implicating the *Navarro* line of cases, or, as respondents would have it, a phony trust such as a Maryland REIT? Would the answer depend on particular details of the relevant state's law? If so, which details? The confus-

ing morass of verbiage respondents offer, see Resp. Br. 21-22, does not answer these questions.

The only hint of a test that can be gleaned from respondents' brief is the suggestion that any trust with the state law capacity to sue or be sued in its own name should be treated for diversity purposes not as a true trust, but rather as an unincorporated association subject to the "members" test of *Carden*. See Resp. Br. 22. But that proposed test would not answer the question presented here or in most other cases. First, it is not at all clear (and respondents nowhere explain) why a trust's ability to sue or be sued in its own name should trigger an inquiry into the citizenship of the *beneficiaries*, as opposed to that of the trustees. As Americold noted, neither at common law nor in modern practice in *any* jurisdiction are beneficiaries generally authorized to control trust property, conduct trust litigation, or held liable for the obligations of a trust. See Pet. Br. 15-19.

Similarly, respondents have no theory for why the capacity to sue and be sued should determine what constitutes a "real" trust for diversity purposes. Certainly, trusts at common law generally lacked the capacity to sue or be sued in their own names. See Pet. Br. 16. But it is equally true that trusts had many other attributes at common law that have been altered over the years by certain states' laws. No one would contend that such alterations mean that trusts in these states are no longer "real" ones. Indeed, like trusts, partnerships and associations also lacked the capacity at common law to sue or be sued in their own name. Pet. Br. 24. Many states have altered that rule by statute, see *ibid*, yet this Court never has suggested

that this change somehow deprives such entities of their status as partnerships or associations.

Nor would a rule that turns upon an entity's ability to sue or be sued be easily administrable. Litigation over whether a particular type of trust can sue and be sued under state law is commonplace. See, *e.g.*, *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (per curiam) (noting conflicting state authority regarding ability of trust to sue or be sued in its own name); *Colorado Springs Cablevision, Inc. v. Lively*, 579 F. Supp. 252, 253-54 (D. Colo. 1984) (noting uncertainty under state law regarding same issue). Cf. *Swanson v. Comm'r of Internal Revenue*, 296 U.S. 362, 364 & n.3 (1935) (noting uncertainty regarding validity under Illinois law of trust agreement permitting trust to sue and be sued in its own name). A rule under which jurisdictional determinations would turn upon an entity's ability to sue and be sued under state law is a recipe for confusion and satellite litigation—exactly what this Court strives to avoid in jurisdictional inquiries. See *Hertz*, 559 U.S. at 94.

Americold's proposed rule, by contrast, would present courts with no new logistical or practical difficulties. It would involve only two simple questions: first, does the relevant state law treat the entity as a trust? And second, does the trust structure involve a separation of legal from equitable title, such that the trust is managed by trustees who exercise the "customary powers to hold, manage, and dispose of [trust] assets for the benefit of others," 446 U.S. at 464, as is required to meet the *Navarro* real-party-to-the-controversy test? If so, then the citizenship of the

trustees is controlling. No more complex analysis is required.[1]

B. Trustees, Rather than Beneficiaries, Are the Analogues in the Trust Context of the "Members" of a Partnership or Association

1. There is generally *no* practical difference between naming a trust and naming a trustee as a party. Yet respondents insist that where a trust is a named party to litigation in its own right, *Carden* dictates that courts consult the citizenship of the trust's "members"—which respondents insist must include the trust's beneficiaries. Resp. Br. 23. Respondents take *Carden* too far. Certainly, *Carden* controls in holding that an unincorporated entity (such as the trust at issue here) does not take citizenship in its own right, as would a corporation. 494 U.S. at 189-192. Thus, courts must look *through* the unincorporated entity to some other constituents to determine its citizenship.

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[1] Respondents accuse Americold of "trot[ting] out the same old 'real party to the controversy test' urged and rejected in *Carden*." Resp. Br. 32. But respondents do not acknowledge *why* the *Carden* Court found that test inapplicable. It did so for two reasons: first because the line of cases beginning with *Chapman v. Barney*, 129 U.S. 677 (1889), foreclosed the argument that any non-corporate artificial entity that was a "real party" could be a citizen in its own right for diversity purposes, *Carden*, 494 U.S. at 191-92; and second because the "real party" test as applied in *Navarro* involved "the distinctive common-law institution of trustees," rather than members of an unincorporated association or partnership, *Carden*, 494 U.S. at 194. Those concerns are not implicated here, because no party contends that a trust should be afforded citizenship in its own right, and because this case, unlike *Carden*, *does* involve a trust and trustees. See Pet. Br. 20-23.

But *Carden*'s identification of those constituents with "members" is uninformative in a case involving a trust, which (unlike an association or a partnership) has no "members" and which this Court's precedents and the common law always have treated as distinct from other types of unincorporated entities.

Even exporting *Carden*'s terminology, there can be no doubt that it is the trustees of a trust, not its beneficiaries, who occupy a position akin to the "members" of a partnership or association. Pet. Br. 23-26. At common law, both trusts *and* partnerships and associations lacked the ability to sue or be sued in their own names. Just as litigation involving the assets or liabilities of partnerships or associations was conducted by the members, so was litigation involving the assets or liabilities of trusts conducted by the trustees. That doctrinal history explains why the Court has continued to consult the citizenship of the members of a partnership or association even in cases where the partnership or association itself is named as a party to litigation in its own right. See *id.* 24. The same logic should lead this Court to conclude that the citizenship of trustees should be consulted in cases where a trust is a party to litigation in its own right. See *Thomas*, 195 U.S. at 218 (citizenship of trustees governed even though the board of trustees, rather than the individual trustees, was the named party).[2]

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[2] Respondents complain of a lack of authority for the view that the common law rule governing actions involving partnerships and associations has guided this Court's treatment of those entities for citizenship purposes. Resp. Br. 38. But it is undoubtedly "'the tradition of the common law'" upon which the Court's jurisprudence in this field is founded, with any "further

Moreover, the very structure of a trust, in which legal title is separated from equitable or beneficial title and is placed in the hands of the trustees, distinguishes the trust structure from that of a partnership, in which property at common law was held and controlled by all of the "members." As *Carden* explains, modern innovations that distinguish among types of members (such as limited partnerships) provide no basis to disturb this Court's jurisdictional principles. But the clear distinction between trustees and beneficiaries is the exact opposite of a modern innovation—it dates back to the ecclesiastical courts.

2. Nothing in respondents' brief disturbs this straightforward conclusion. Respondents assert that "this Court decidedly left no doubt that [an] unincorporated artificial entity's 'members' include, at minimum, all of the entity's beneficial owners." Resp. Br. 23. But the only authorities respondents cite (see *id.* 23-24) are cases involving partnerships—all of which fall within the common-law rule that all partners are liable for a partnership's obligations. Those cases say nothing about beneficial ownership, much less suggest that every person who may have a direct or indirect beneficial ownership interest in a trust qualifies as a "member" for purposes of diversity jurisdiction.[3]

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adjustments to be made by Congress." *Carden*, 494 U.S. at 190, 196 (quoting *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480 (1933)); see also *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 455-456 (1900) (rejecting argument that change in state law regarding ability of party to sue and be sued warranted departure from Court's longstanding approach to determining citizenship).

[3] Respondents also cite Justice Ginsburg's observation in a dissenting opinion in *Grupo Dataflux v. Atlas Global Group,*

Respondents' proposed "beneficial ownership" test for citizenship cannot be reconciled with this Court's precedents. As Americold noted (Pet. Br. 32), in *Thomas*, the Court held that where the Board of Trustees of the Ohio State University was named as a defendant as an entity (and the individual trustees were not named), the relevant citizenship was nonetheless that of the trustees. 195 U.S. at 218. The Court did not, as respondents' test would require, ask who were the "beneficial owners" of the state university. Respondents' beneficial-ownership test also is incompatible with this Court's many cases holding that, in litigation conducted by a bona fide personal representative on behalf of a third party holding a beneficial interest in the lawsuit, the representative's citizenship, and not that of the beneficiary, controls. See Pet. Br. 14-15. Respondents make no effort to square their rule with these cases.

Nor are respondents correct that, under Americold's rule, limited liability companies, limited partnerships, and corporations "must be treated like common law trusts, measuring diversity of citizenship by their managers," Resp. Br. 25. At common law, partnerships, associations, and corporations were treated as

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L.P., 541 U.S. 567, 585 n.1 (2004), that some lower courts have treated LLCs, for diversity purposes, as citizens of each state in which one of their "members" is a citizen. Resp. Br. 24. That point is irrelevant because the main rationale of those cases rests not on beneficial ownership but rather on the conclusion that, in light of the close relationship between LLCs and partnerships (and the absence of any common law rule governing LLCs), LLCs presumptively should be treated like partnerships for citizenship purposes. See, *e.g.*, *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (cited in *Grupo Dataflux*, 541 U.S. at 585 n.1 (Ginsburg, J., dissenting)).

fundamentally different from trusts. Pet. Br. 15-19. As this Court's precedents make clear, the operational similarities between some types of trusts, on the one hand, and some types of partnerships, associations, or corporations, on the other, does not require that some or all trusts be treated like those other entities for citizenship purposes—just as the functional similarities between corporations and limited partnerships or LLCs does not mean that those entities must be treated alike. See, *e.g.*, *Carden*, 494 U.S. at 196; *Navarro*, 446 U.S. at 465; Pet. Br. 29-30; *infra* at 13-14. Given the clear state laws permitting the creation of statutory trusts and governing their existence, the lower courts should have no difficulty distinguishing what entities would be subject to the rule for trusts and what entities would not. And if state law should ever devolve to the point of authorizing "sham" trusts that lack any attributes of a *bona fide* trust—an eventuality that has not occurred to date—this Court or Congress could address the problem at that time.

Respondents also ask the Court to disregard the many nineteenth-century cases that draw an explicit parallel between the trustees of a trust and the members of a partnership or association, see Pet. Br. 25-26, contending that these cases "involve only non-juridical, unincorporated common law trusts or associations without capacity to sue or be sued under state law," Resp. Br. 28-29. That response misses the point. It is common ground that trusts and associations lacked the capacity to sue or be sued at common law. See Pet. Br. 24. The point is that, in holding that litigation must be conducted by the members of an association or the trustees of a trust, these courts treated the two positions as analogous—namely, that for purposes of litiga-

tion, an association is to its members as a trust is to its trustees. *Id.* 25; see, *e.g.*, *Thomas v. Dakin*, 22 Wend. 9, 34-35 (N.Y. Sup. Ct. 1839). That congruence confirms that, assuming *Carden*'s "member" test applies here, it is the trustees of a trust, and not its beneficial or equitable holders, who should be considered the trust's "members."

C. Respondents' Discussion of the Particular Attributes of Maryland REITs Is Both Irrelevant and Wrong

Respondents dwell upon the particular attributes of Maryland REITs, of which the Americold Realty Trust is one. See Resp. Br. 13-39. This is a puzzling sequel to their Response to Americold's certiorari petition, which urged this Court to grant review and never suggested that Maryland REITs had *any* attributes that would make this case an inappropriate vehicle for considering the much broader question presented in the petition. Regardless, respondents' arguments about the supposedly distinctive features of Maryland REITs lack merit.

1. As noted above, it is irrelevant that Maryland REITs may resemble other forms of business organization in certain respects. This Court, for good reason, has long eschewed citizenship tests that turn upon a functional analysis of how a particular type of entity operates. The Court has emphasized that formalism "has been the character of our jurisprudence in this field," *Carden*, 494 U.S. at 196, and more specifically has held that a trust's resemblance to other forms of business organization "has no bearing" on the citizenship inquiry, *Navarro*, 446 U.S. at 465. Even if the Court were to abandon that approach and look to prac-

tical business realities, it would make far more sense to adopt the rule proposed by amicus National Association of Real Estate Investment Trusts—under which REITs would be treated like corporations—than to adopt respondents' convoluted approach.

2. In any event, nothing meaningfully distinguishes Maryland REITs from all other types of trusts for citizenship purposes. Respondents suggest that Maryland REITs are unusual in that, under Maryland law, all such trusts hold legal title to the trust property in their own name. Resp. Br. 34-35. But that is simply incorrect, according to the very Maryland statute respondents cite—which explicitly states that a REIT may hold and dispose of legal title to property *either* "in the name of the trust *or in the name of its trustees*." Md. Code Ann., Corps. & Ass'ns § 8-301(12) (emphasis added).

In that respect, Maryland law mirrors the laws of many other states, under which laws the legal title to trust property may be held *either* by the business trust in its own name *or* by the trustees in their names. See, *e.g.*, Nev. Rev. Stat. § 88A.210(3) ("a business trust may hold or take title to property in its own name, or in the name of a trustee in the trustee's capacity as trustee"); S.D. Codified Laws § 47-14A-22 ("legal title to the property of the business trust ... may be held in the name of any trustee of the business trust, in its capacity as such, with the same effect as if such property were held in the name of the business trust"); 15 Pa. Cons. Stat. Ann. § 9502(a), (c) (same). In other states, title to the property of a business trust may be vested in either the business trust alone (see Va. Code Ann. §§ 13.1-1210, 13.1-1270) or in the trustees alone (see, *e.g.*, Ala. Code § 19-3-62; Ky. Rev. Stat. Ann.

§ 386.390), as is also the case with traditional trusts, see Pet. Br. 15-17. These state law variations are an unsound basis for making distinctions that would alter citizenship status.

Indeed, the fact that *all* states place legal title in the trust itself, in the trustees, or in both—but *never* in the beneficiaries—confirms that, as with traditional trusts, business trusts and other statutory trusts embody the fundamental trust principle of separation of legal from equitable title. In light of that separation and the placement of absolute control of trust property in the hands of the trustees, regardless of where formal title is held, courts should continue looking to the citizenship of the trustees, not that of the beneficiaries.

Respondents repeatedly stress that Maryland REITs may sue or be sued in their own name—a fact that they suggest should make a difference here. See Resp. Br. 20, 35. But, as Americold noted (Pet. Br. 27-28), the same is true of most business trusts across the country—including the Massachusetts trust at issue in *Navarro*. See 446 U.S. at 459 (*Navarro* trust was "a business trust organized under Massachusetts law"); *Morrison v. Lennett*, 616 N.E.2d 92, 94, n.7 (Mass. 1993) (business trusts may be sued directly under Massachusetts law). It nonetheless remains the trustees, not the beneficiaries, who control the conduct of the trust's litigation and generally remain liable in their own names for the trust's obligations. Pet. Br. 28-29.

3. Finally, respondents are incorrect to suggest that the trustees of Americold Realty Trust somehow lack the powers and duties of ordinary trustees. Americold's articles of trust clearly state that the trustees

"shall have full, exclusive and absolute power, control and authority over any and all property of the Trust. The Board may take any action as in its sole judgment and discretion is necessary or appropriate to conduct the business and affairs of the Trust." Pet. App. 56, 60. That includes the power, "without limitation" and "without any action by the shareholders of the Trust," to "adopt, amend, and repeal Bylaws," to "elect officers in the manner prescribed by the Bylaws," and even to "terminate the status of a Trust as a real estate investment trust under the Code." *Id.* 61. Americold's trustees are not, as respondents would have it, merely "a titular board of managers." Resp. Br. 7. They have the same powers and serve the same function as trustees in this Court's prior cases, including *Navarro*. See 446 U.S. at 464 (discussing "customary powers" of trustees "to hold, manage, and dispose of assets for the benefit of others").

D. Respondents' Brief Confirms the Significant Practical Problems the Court of Appeals' Approach Would Entail

As Americold explained in its opening brief (at 30-31, 33-35), the Court of Appeals' rule not only would provide obvious opportunities for litigation gamesmanship but would be burdensome and difficult (or impossible) for courts and litigants to apply. Respondents' brief does not demonstrate otherwise.

A fatal practical problem with the Court of Appeals' approach is that, for many trusts, it cannot be easily applied, or even applied at all. As Americold noted, many trusts, such as charitable and public trusts, have no beneficiaries, or the beneficiaries may not be ascertainable at the time of litigation. Pet. Br. 34. Cf.

Thomas, 195 U.S. at 213-14, 218. For many other trusts, the beneficiaries may be so numerous, and ever-changing, that reliably ascertaining their citizenships at the time of litigation proves to be a daunting task. Pet. Br. 34-35. Respondents' brief ignores these important practical considerations.

As for gamesmanship around naming the trust or the trustees to destroy or create diversity, respondents again revert to a narrow focus on Maryland REITs, asserting that naming the trustees of these entities is not a genuine option because they "generally are not liable for REIT obligations." Resp. Br. 40. That is an overstatement: Maryland REIT trustees remain liable in some circumstances. See Md. Code Ann., Corps. & Ass'ns § 8-601(b); Md. Code Ann., Cts. & Jud. Proc. § 5-419(a)-(c). More importantly, any rule this Court announces will apply to other entities besides Maryland REITs, and in many other states, the trustees of a business trust do remain personally liable for the obligations of the trust, even though the trust may also be sued in its own name. See Pet. Br. 28-29 (collecting authorities); see also, *e.g.*, *N.H. Ins. Co. v. McCann*, 707 N.E.2d 332, 338 (Mass. 1999); *Goldwater v. Oltman*, 292 P. 624, 631 (Cal. 1930); *Betts v. Hackathorn*, 252 S.W. 602, 604 (Ark. 1923). In these jurisdictions, there is no escaping the fact that the Court of Appeals' rule would invite gamesmanship. Sue the trustee, look to the trustee's citizenship; sue the trust, look to the beneficiaries' citizenship. See Pet. Br. 30-31.

Respondents' second response is to ignore the forum shopping problem and suggest that plaintiffs always may seek to craft their complaints to create or avoid diversity. Resp. Br. 41-42. But this Court long has recognized that, all other things being equal, procedur-

al and jurisdictional rules should minimize opportunities for forum shopping. See, *e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004); *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990). The cases cited by respondents do not hold otherwise. No doubt, a plaintiff may decide not to sue diverse parties, or not to seek full damages, in order to avoid diversity. But those choices come with real-world consequences: certain parties are not before the court, or the amount at stake in the lawsuit is limited. By contrast, the decision whether to sue a trust or its trustees generally entails *no* real-world consequences where recovery is sought from trust assets. Announcing a rule under which such an otherwise meaningless distinction would result in different jurisdictional outcomes would create costless and unseemly opportunities for forum shopping.

E. The Court Need Not and Should Not Reach Respondents' Belated Alternative Argument in Support of Affirmance, which Lacks Merit in Any Event

Respondents contend that the Court of Appeals' no-jurisdiction holding should be affirmed on the alternative ground that, even if this Court adopts Americold's view on the question presented, complete diversity was lacking at the time of removal and judgment due to the presence of two parties (Safeway and Kraft) that did not appeal the district court's judgment. Resp. Br. 47-48. The Court need not and should not reach that issue, but if it does, it should reject respondents' argument.

The appearance in respondents' brief of this alternative ground for affirmance is highly unusual. At the certiorari stage, respondents agreed with petitioners

that the question presented warranted this Court's review. Nowhere in their brief responding to Americold's cert petition did respondents suggest that the presence of Safeway and Kraft in the district court might pose an obstacle to this Court's review of the question presented. Cf. S. Ct. Rule 15.2. As respondents concede, they took the opposite position before the Tenth Circuit, arguing that Safeway and Kraft's presence in the district court did not require dismissal of respondents' appeal and that Safeway and Kraft were dispensable parties in any event.[4] Resp. Br. 47 n.10. Respondents now profess to have had a change of heart on this point—including on the purely factual question whether Safeway and Kraft are indeed dispensable parties. See *ibid.*

This Court should leave respondents' argument for the lower courts to address in the first instance. The Court of Appeals did not reach the question whether Safeway and Kraft's presence before the district court required dismissal of the appeal in this case, despite having requested briefing on that issue. See Pet. App. 4. Because this Court is "a court of review, not of first view," its ordinary practice is not to consider matters that were "not addressed by the Court of Appeals." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). That practice makes particular sense where, as here, the issue is not independently worthy of this Court's review and its resolution may depend on facts not in the

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[4] Respondents' argument that the lack of diversity at time of removal and judgment necessitates dismissal is made even more puzzling by their agreement, in motion practice before this Court, that Americold Logistics LLC should be dismissed as a dispensable party and that doing so would allow this Court to reach the question presented here.

record (in this case, for example, whether Safeway and Kraft were or were not dispensable parties and whether respondents should be held to their earlier concession on that point, see Resp. Br. at 47 n.10). See, *e.g.*, *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975).

Nor does the fact that respondents' proposed alternative ground for affirmance concerns subject-matter jurisdiction mean that this Court must resolve it now. Although a determination of "subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). Here, because both the question presented and respondents' alternative ground for affirmance concern threshold jurisdictional issues, this Court may vacate the Court of Appeals' judgment and remand for further consideration of other issues (including the proposed alternative ground) without addressing other arguments as to why lack of jurisdiction may prevent a ruling on the merits. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("'[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.'"). Cf. *Carden*, 494 U.S. at 197 (declining to reach proposed alternative ground for affirmance as to jurisdictional question).

If the Court does reach respondents' proposed alternative ground for affirmance, the argument is meritless and should be rejected. Although it is generally true that complete diversity must be present at the time federal jurisdiction is invoked and at the time of judgment, see *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996), it is also well established that where an absence of complete diversity goes undetected through the time of judgment, it may be cured on appeal by the

appellate court's dismissal of a dispensable nondiverse party. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989); see also *Grupo Dataflux*, 541 U.S. at 572 (dismissal of a nondiverse party is a "method of curing a jurisdictional defect [that] had long been an exception to the time-of-filing rule"). And where, as in the case of Safeway and Kraft in this action, a party makes a "considered choice not to appeal" the district court's adverse judgment, the judgment becomes final as to that party and has the effect of removing the party from the proceedings, regardless of the outcome of another party's appeal. *Ackermann v. United States*, 340 U.S. 193, 198 (1950). It follows that where, as here, a nondiverse party (particularly a *dispensable* nondiverse party, as Americold believes the factual record in this case would show Safeway and Kraft to be) has chosen not to appeal the district court's judgment, that defect will not preclude the Court of Appeals from reaching the merits of an appeal involving the remaining parties, so long as the remaining parties satisfy the complete-diversity requirement. Article III does not mandate a contrary result, and "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green*, 490 U.S. at 836.

CONCLUSION

For these reasons and those set forth in Americold's opening brief, the judgment of the Court of Appeals should be vacated and the case should be remanded.

Respectfully submitted,

KRISTIN LINSLEY MYLES
JOSHUA PATASHNIK
MUNGER, TOLLES & OLSON LLP
560 Mission Street
27th Floor
San Francisco, CA 94105
(415) 512-4000

MICHAEL D. POSPISIL
Counsel of Record
JOHN M. EDGAR
EDGAR LAW FIRM LLC
1032 Pennsylvania Ave.
Kansas City, MO 64105
mdp@edgarlawfirm.com
(816) 531-0033

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